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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 488

THE CALLANAN ROAD IMPROVEMENT COMPANY,
A CORPORATION, SOUTH BETHLEHEM, NEW YORK,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND CORNELL STEAMBOAT COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

MOTION OF CORNELL STEAMBOAT COMPANY TO AFFIRM

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action No. 4273

THE CALLANAN ROAD IMPROVEMENT COMPANY,
Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees

MOTION BY CORNELL STEAMBOAT COMPANY, INTERVENING-DEFENDANT, TO AFFIRM

Cornell Steamboat Company, intervening defendant, respectfully moves that, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, the decree of the District Court, entered on September 15, 1952, be affirmed.

This is a direct appeal from the final decree, entered September 15, 1952, by the District Court, specially constituted of three Judges. The decree dismisses the appellant's complaint to set aside an order of Division 4 of the Interstate Commerce Commission, dated October 18, 1951, as affirmed by an order of the entire Commission on reconsideration, dated March 17, 1952. The order thus com-

plained of, with the report made a part thereof (285 I.C.C. 75), found that appellant herein "has been and is performing the service of towage without appropriate authority therefor under section 309 [of the Interstate Commerce] act", that its tariff providing for allowances to shippers is in respect to unauthorized towage, that such allowances "are published without authority, and therefore are unlawful"; and that plaintiff is required to cancel the "rates, charges, and allowances described", in this report (285 I.C.C. 75) and therein found to be unlawful (Ex. No. 4 to the complaint.

An appeal from the final decree above mentioned was allowed on November 7, 1952, and the appeal papers were served on this defendant-appellee on November 10, 1952.

The District Court in its opinion accompanying the above-mentioned final decree states (p. 7) that the report of the Commission (285 I.C.C. 75) "has a complete statement of facts, to which we make reference and which we accept as our own"; that "As a matter of fact there is substantially no conflict as to the basic facts"; and that "the issue arises as to the law applicable.". Basically, as the Court points out (p. 2) appellant, holding a certificate of public convenience and necessity for "freighting" is endeavoring to extend this to include "towing" on grounds which the Commission and the Court find to be clearly without merit.

Vital Concern of Cornell Steamboat Company, Appellee

Cornell has been engaged in the business of towage on the Hudson River for a period of 115 years. Following enactment of the water-carrier provisions of the Interstate Commerce Act, it applied to the Commission for, and was granted, a certificate authorizing "towage" on this river. On the other hand, the Callanan Road Improvement Company, appellant, a concern engaged in the production of

stone and other products, did not become a carrier until after the transfer to it, pursuant to authority of the Commission granted on August 18, 1947, of operating rights to perform transportation on the Hudson River by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels, a service generally known as "freighting." The certificate issued to Callanan contains no reference to towage or towage rights. Callanan apparently recognizing that its certificate did not permit "towage" as distinguished from "freighting" filed a tariff providing for allowances to shippers in connection with barges furnished by them. By this device appellant sought to conduct in reality towage services for shippers furnishing their barges under the allowance provisions of its tariff and succeeded in diverting traffic from Cornell to its great injury. Appellant, although in reality having no towage rights, and although having acquired its "freighting" rights for only $2,750 was thus able to divert from Cornell, a carrier limited to towage, traffic amounting in one year alone to a loss in revenue of over $250,000 (R. 141, 142).[1]

The Proceeding Before the Commission

The order of the Commission here under consideration resulted from complaint made by Cornell of alleged unlawful towage by Callanan pursuant to the allowance provisions in its tariff and from a petition by Callanan for interpretation of its certificate. A hearing was held before

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[1] The District Court in concluding, as did the Commission, that the service performed by Callanan under the allowance device above mentioned was and is actually towage, not authorized by its certificate, stated, p. 9:

> "In fact it is because of this operation [by Callaman] and rates and allowances it has made upon receiving shippers' scows laden with New York bound commodities that plaintiff has been able to undercut Cornell, causing—on its initial purchase of $2,750—a loss to Cornell asserted by the latter to have reached $250,000 of revenue in a single year".

the Commission, at which Callanan was opposed by several carriers but the "brunt" of the opposition, as stated by the Court (p. 2), was borne by Cornell.

As late as the hearing in that proceeding, Callanan admitted, by counsel, that the rights transferred to it did not include the right to perform towage and that the type of service performed by it under the allowance provisions of its tariff was not towage but freighting (R. 9, 10). Nevertheless, later, as an exigent afterthought,[2] Callanan contended that its certificate, although consented to, could not be interpreted to exclude towing, that such interpretation would constitute an unauthorized revocation in part of its certificate, and that in any event the Commission had no power under the statute to specify services and limit Callanan's operations to exclude towage. Callanan also contended that its allowance practice was not towage but freighting and thus permitted under its certificate. Such contentions, overruled by the Commission and the District Court, are again made on appeal.[3]

(1) *Contention of appellant as to indirect revocation of its certificate by the report and order here in issue.* In substance appellant's claim is that its certificate in authorizing operation by non-self-propelled vessels with the use of separate towing vessels does not exclude "towage" as distinguished from "freighting", and that the report and order of the Commission here in question, in finding that towage is not included, effects a partial revocation of the certificate.

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[2] The District Court said, page 9, "Plaintiff's present attempt to expand its grant is an obvious afterthought stimulated by the exigencies of its competition with Cornell".

[3] A further contention is made by appellant as to alleged failure to comply fully with the Administrative Procedure Act. The District Court holds that this contention borders on the "frivolous" (p. 17). It is so clearly bereft of merit that it is not dealt with here.

This contention runs counter to the long line of cases decided by the Commission holding that certificates providing for such use of equipment as that set forth in the Callanan certificate is "freighting" and does not include "towage". Moreover, Callanan's actual knowledge and recognition of the fact that its certificate permits only freighting and not towage was clearly admitted at the hearing before the Commission (R. 9, 10), referred to above. The resort by Callanan to the allowance device as an attempt to give the semblance of freighting services to operations actually amounting to towage is a further admission of the knowledge by Callanan that its certificate did not authorize towing. Otherwise it would have directly offered to perform towage services.

Callanan argues that its contention "is critically important to all water carriers" (Statement as to jurisdiction, p. 7). The fact is that no water carrier, either before the Commission or the District Court, has supported Callanan in this contention or its other contentions. Such carriers recognize the soundness and justness of the long line of decisions of the Commission distinguishing between freighting and towage and holding that freighting certificates do not include towage.

The distinction between freighting and towage is designed to preserve the inherent advantages of such services as contemplated by the Interstate Commerce Act and the National Transportation Policy, to maintain parity between future service and past bona fide operation in cases under the "grandfather" provisions of the Act, and to maintain "the competitive balance of types of carriers over the same route" without disruption by unauthorized services. *Erie & St. Lawrence Corp. Contract Carrier Application*, 260 I.C.C. 235, 238; *Norfolk, Baltimore and Carolina Line, Inc., Ext.—James R.*, 265 I.C.C. 247, 253, 254, af-

firmed as to this matter, by the entire Commission, 265 I.C.C. 313, and *A. L. Mechling Barge Line Common Carrier Application*, 250 I.C.C. 77, 78.

Appellant's predecessor in interest was Joseph R. Hutton who, as the District Court states (p. 3), "owned and managed," during "the crucial grandfather period prior to January 1, 1940", "one steam-power boat of about 240 horsepower, and four barges, all of which were operated as a unit." Hutton was not engaged in towage services during the "grandfather" period, and was not entitled to a certificate authorizing such operation.

The original decision of the Commission holding that Hutton was entitled to "grandfather" rights did not specify the equipment which might be used in performing the service authorized (*Hutton Contract Carrier Application* 250, I.C.C. 804, July 17, 1942). The certificate issued was subject to such terms and conditions as might later be attached by the Commission to the exercise of the authority granted.

In the meantime, as the District Court also pointed out (p. 4), the Commission had occasion to state the distinction between freightage and towage, such distinction going "back to well-known differences in admiralty shown by the difference in liability of a towboat and of a common carrier of freight." *Stevens* v. *The White City*, 285 U. S. 195, 200. In *Campbell Transportation Co. Common Carrier Application*, 260 I.C.C. 107, December 14, 1943, the Commission as in other cases emphasized that "Towage is a distinct type of service or field of operation". It said, "Carriers whose certificates or permits do not specifically authorize the performance of towage are without authority to engage in such service".

Later, on March 4, 1944, the Commission ordered the Hutton application opened for reconsideration and filed a report and amended certificate specifying freighting,

namely, operation by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels. It thus provided for the very type of service which Hutton had performed during the "grandfather" period and as to which it was actually entitled to a certificate. Authority to perform towage was not provided for in the certificate and was properly excluded.

Although ample time was provided for objection or review of its decision before its effective date, Hutton made no effort to object or contest such decision and the amended certificate made pursuant thereto. This was natural because the certificate gave him exactly what he was entitled to receive under the "grandfather" provisions of the Act, namely, the right to perform freighting.

Thereafter, on August 18, 1947, in *Joseph R. Hutton Certificate Transfer,* 265 I.C.C. 813, the Commission authorized Callanan to acquire the certificate which had been granted to Hutton, the transfer being made by Hutton's administratrix for a consideration of $2,750. In that case Callanan not only did not object to the specification of the equipment in the Hutton certification and the limitation to freighting, but in answer to a contention by a water carrier association that the certificate should exclude "self-propelled vessels" urged "that the certificate may not be attacked collaterally in this proceeding" and "that when a certificate is finally granted, and the time for rehearing has expired, a certificate is not subject to revocation in whole or in part" (Ex. No. 3 to complaint).

Following the Commission's order in the *Transfer Case, supra,* it issued to Callanan an amended certificate, dated February 5, 1948, which by its terms was not to become effective until March 19, 1948, over thirty days later. The certificate contained the same provision as to use of equipment as in the Hutton certificate which was authorized to

be transferred. No objection was made by Callanan, within the period prescribed, to the certificate which was thus issued to it and which was in fact its original and only certificate.

These facts unmistakably show that Callanan knew that it was restricted to freighting as distinguished from towing, and that it and its predecessor in interest, Hutton, made no objection to, and in fact, consented to, such restriction in the certificate. The order here under attack does not in any way change or modify Callanan's certificate. It merely recognizes, as its long course of action showed and Callanan itself admitted, that the certificate permits freighting only and not towage.

Appellant heavily relies upon *United States* v. *Seatrain Lines*, 329 U. S. 424 (1947) as authority for the contention that the Commission cannot revoke in whole or in part a certificate after it is once issued to a water carrier. The District Court in the present case, and the Commission as well, have shown that the *Seatrain* case has no application here because the certificate in that case was duly protested while the certificate in the present case was clearly consented to. Moreover, as the District Court points out the equities in the two cases are clearly different.[4] In the *Seatrain* case the change in the certificate was not only objected to by the carrier there involved but such change clearly narrowed and restricted rights to which that carrier had shown it was entitled. In the present case Callanan and its

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[4] The District Court said, page 12, "Certain differences in the legal situation and the equities are at once obvious". In the *Seatrain* case, "Seatrain fought throughout to preserve rights it had definitely exercised" which the Commission "had recognized with finality" and which it sought later "to take * * * away". In the present case in contrast "the early reopening was to clarify the grandfather rights sought and granted, and the correction was accepted". What is dealt with "is a later attempt [by appellant] to expand those rights beyond anything covered or contemplated by the grandfather privilege".

predecessors are limited in the certificate issued by the Commission to exactly the operating rights to which they are entitled under the "grandfather" clause, namely the rights to perform freighting and not towing, and such limitation was consented to. The contention as to revocation is without substance.

(2) *Contention by appellant as to alleged absence of power in the Commission to specify the type of service to be rendered.* Both the District Court and the Commission show that under the provisions of Section 304(c) of the Act and Section 309, the Commission has ample authority to classify carriers in terms of their type of operation because this "assures the public that the same type of service will be continued by them" and that "the competitive balance of types of carriers over the same route will not be disrupted by changes which they might make without first securing from this Commission the necessary certificates of public convenience and necessity". *A. L. Mechling Barge Line Common Carrier Application*, 250 I.C.C. 77; *Erie & St. Lawrence Corp. Contract Carrier Application*, 260 I.C.C. 235, 238, and *Norfolk, Baltimore and Carolina Line, Inc., Ext.—James R.*, 265 I.C.C. 247, 253, 254, affirmed on this point by the entire Commission, 265 I.C.C. 313.

In numerous cases, as the District Court points out (p. 13), the Commission has acted to grant both freighting and towing rights by careful and specific mention of each or by specific grant of operation in the performance of towing alone.[5]

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[5] *Tidewater Transp. Co., Common Carrier Application*, 260 I.C.C. 30, affirmed in *Inland Navigation Co. v. United States*, 76 F. Supp. 567 (1948), *James McWilliams Blue Line Inc., Com. Car. Application*, 260 I.C.C. 15; *Upper Mississippi Towing Corp. Com. Car. Applications*, 260 I.C.C. 85; and *Southern Transp. Co. Contract Carrier Application*, 260 I.C.C. 129. Other decisions by the Commission (not printed in full) which were made prior to the March 7, 1944, amended certificate above

The *Seatrain* case, *supra*, relied upon by appellant, is no authority for a contrary view. Later decisions by the Supreme Court, although not discussing this specific point, have upheld certificates specifying the equipment to be used and the service to be performed, including "freighting". *Warner* v. *United States*, 341 U. S. 907, affirming on motion, D.C. W.D. Tenn., 97 F. Supp. 580 (referring to specification of freighting on p. 582), which sustained 265 I.C.C. 543; *United States* v. *Detroit & Cleveland Nav. Co.*, 326 U. S. 236, sustaining the certificate in 260 I.C.C. 175, specifying operation by "self-propelled vessels".

The proviso of Section 309(d), as the District Court makes plain, does not prevent the limitation of facilities and service in appellant's certificate. The intent of the "grandfather" clause would be "set at naught" if appellant's contention were sustained and the effect would be not to preserve, but unjustly to enlarge, "the position which the carrier had obtained in the nation's transportation system". *Noble* v. *United States*, 319 U. S. 88, and *Crescent Express Lines* v. *United States*, 320 U. S. 401.

(3) *Contention as to alleged revocation of the Hutton certificate of July 17, 1942.* This contention has been dealt

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mentioned and which provided for both "freighting", namely by non-self-propelled vessels with the use of separate towing vessels, and towage because, unlike the present case, the "grandfather" operation included both are the following: *Inland Waterways Corporation Common Carrier Application*, 260 I.C.C. 808; *Arrow Tug & Barge Co. Contract Carrier Application*, 260 I.C.C. 808; *Diesel Towing Co. Contract Carrier Application*, 260 I.C.C. 809; *Ohio River Company Contract Carrier Application*, 260 I.C.C. 810; *Harbor Towing Company Contract Carrier Application*, 260 I.C.C. 810; *Westport Towboat Company Contract Carrier Application*, 260 I.C.C. 812; *Blaske Lines Contract Carrier Application*, 260 I.C.C. 813; *Washington Tug & Barge Co. Applications*, 260 I.C.C. 814; *American Tug Boat Co. Application*, 260 I.C.C. 814; *Pioneer Towing Co. Applications*, 260 I.C.C. 814; *Olympia Towing Co. Applications*, 260 I.C.C. 814; *Olson Tug Boat Co. Applications*, 260 I.C.C. 814; *Tacoma Tug & Barge Co. Applications*, 260 I.C.C. 815; *Portland Tug & Barge Co. Contract Carrier Application*, 260 I.C.C. 817; and *Grizzaffi Motor Company Applications*, 260 I.C.C. 819.

with above in respect to contentions 1 and 2. Not only did Hutton, appellant's predecessor in interest, consent to the amended certificate of March 7, 1944, under which ample time was provided for objection before it became effective, but appellant consented to the transfer of this amended certificate to it by the order of August 18, 1947, without objection, and further consented to the amended certificate issued to it pursuant to order of February 5, 1948, although having ample time within which to object to that certificate. There was, of course, no objection because the freighting rights provided for were those which had been justified under the "grandfather" clause and there had been no ground shown for towing rights.

As an additional reason for rejecting appellant's contention, the certificate issued to appellant following the approval of the transfer above mentioned is the original and only certificate received by this carrier, and prior thereto the Commission could have provided for the restriction as to equipment and service set forth therein, even if contrary to fact, the amended certificate of March 7, 1944, to Hutton had been invalid. See *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419 (1951).

(4) *The contention of appellant as to alleged revocation of the allowance provisions of the Interstate Commerce Commission Act.* As the District Court and the Commission concluded, allowances cannot properly be paid by a carrier in respect to services which it is not authorized to perform. Here appellant is not authorized to perform towage and the payment of allowances in respect to such service is, therefore, unlawful, and is properly forbidden by the Commission in the order here in issue.

The District Court aptly summarizes the undisputed evidence before the Commission showing appellant's actual performance of towage, as distinguished from freighting,

and thus the unlawful character of the allowance practice in question (p. 8):

> "The provision for return of shippers' scows light to points of origin, the inapplicability of plaintiff's ordinary rules for free time and demurrage when scows are furnished by shippers, the charge made for the return of the empty scow (or allowance in the tariff when it is not returned), the concession that plaintiff may not itself load such a scow at New York for an upstream movement in lieu of returning the vessel light to its owner at origin, the control of the scows by the shippers' own captains—all support the finding (and permit of no other) that shippers' scows are received by plaintiff as part of a consignment to be towed and are not used as a part of its equipment."

The Commission's findings to the same effect are set forth in its report (285 I.C.C. 75, 80-82). Clearly appellant's service under the allowance provisions is towage, which is not permitted by its certificate, and is not freighting which is authorized therein. The Commission's conclusions, and those of the District Court, are firmly supported by such decisions as *Dixie Carriers, Inc., Rates and Allowances,* 278 I.C.C. 417; *Union Barge Line Applications,* 260 I.C.C. 563; and *Campbell Trans. Co., Common Carrier Application,* 260 I.C.C. 107, 110. Appellant clearly does not have control of shippers' barges by lease, charter, or other arrangement withdrawing them from the category of towing. Appellants' contention that equipment "leased" from a shipper, though a part of the carrier's facilities in freighting service, would not be under the allowance provisions of the Act misconceives those provisions. See, for example, *Payment For Leased Motor Vehicles on Cotton,* 276 I.C.C. 675 (a case involving allowances for lease of motor vehicles).

Moreover, the factual determination by the Commission involved the exercise of the discretion conferred upon it,

and even if there were doubt, as it is believed there is not, such exercise of discretion would be final and conclusive in the absence, as here, of abuse of discretion or departure from statutory standards.

As above indicated, appellant's contention with respect to the Administrative Procedure Act was found by the District Court to "border on the frivolous" and to be without substance. It deserves no discussion here.

Appellant's contentions are thoroughly and devastatingly found by the District Court to be without merit. This was the conclusion of the hearing examiner, of Division 4, and of the entire Commission upon reconsideration. Appellant's contentions are clearly insubstantial, inequitable, and completely lacking in merit.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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November 19, 1952.